11

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 466.

JOHN E. EATON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FANNIE LEIGHTON LUKE, PLAINTIFF IN ERROR,

vs.

BOSTON SAFE DEPOSIT & TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN W. LEIGHTON, DECEASED, AND FANNIE LEIGHTON LUKE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED MAY 12, 1915.

(24,730)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 466.

JOHN E. EATON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FANNIE LEIGHTON LUKE, PLAINTIFF IN ERROR,

vs.

BOSTON SAFE DEPOSIT & TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN W. LEIGHTON, DECEASED, AND FANNIE LEIGHTON LUKE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 14, 1916.

a COMMONWEALTH OF MASSACHUSETTS:

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August, A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August, A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this thirteenth day of May, in the year one thousand nine hundred and fifteen.

[SEAL.] ARTHUR P. RUGG.

b UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Judicial Court of the State of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Boston Safe Deposit & Trust Company, as it is Trustee under the will of John W. Leighton, deceased, plaintiff, and Fannie Leighton Luke and John E. Eaton, as he is Trustee in Bankruptcy of the estate of said Fannie Leighton Luke, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed

c under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States,

and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said John E. Eaton, as he is Trustee in Bankruptcy of the estate of Fannie Leighton Luke, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of April, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

d [Endorsed:] Supreme Court of the United States, October Term, 1914. John E. Eaton, Trustee, etc., Pl'ff in Error, vs. Boston Safe Deposit & Trust Co. and Fannie Leighton Luke. Writ of Error. Suffolk, ss: Supreme Judicial Court. Filed April 17, 1915. John F. Cronin, Clerk.

1 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court, make return of the Writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court have hereto set my hand and the seal of said Court the thirteenth day of May, A. D. 1915.

[SEAL.] JOHN F. CRONIN, *Clerk.*

2 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know Ye, That among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk for the hearing of cases in Equity from the first day of January in the year of our Lord One thousand nine hundred and fourteen to the thirteenth day of May A. D. Nineteen hundred and fifteen, both inclusive, it is thus contained,—the following being the entire record in the case.

3 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Equity.

No. —.

BOSTON SAFE DEPOSIT & TRUST COMPANY, a Corporation Duly Established under the Laws of said Commonwealth and Having Its Usual Place of Business at Boston, in said County of Suffolk, as it is Trustee under the Will of John W. Leighton, Late of Brookline, in the County of Norfolk, Deceased, Plaintiff,

v.

FANNIE LEIGHTON LUKE, of said Brookline, and JOHN E. EATON, of said Boston, as He is Trustee in Bankruptcy of the Estate of said Fannie Leighton Luke, Defendants.

Bill of Complaint.

1. John W. Leighton of Brookline in the County of Norfolk in said Commonwealth, died October 6, 1897, leaving a will which was duly proved and allowed by the Probate Court for said County of Norfolk November 3, 1897, a copy of which will is hereto annexed and made a part hereof and marked "Exhibit A."

The plaintiff was named as trustee in said will, has duly qualified and is now acting as such trustee.

2. Article Second, Section (1) of said will is as follows:

"Second: I give, devise and bequeath to the Boston Safe Deposit and Trust Company, a corporation duly established under the laws of the Commonwealth of Massachusetts and located at Bos-
4 ton, in said Commonwealth, the sum of Seventy-five Thousand Dollars in money, but in trust nevertheless, to invest, hold, reinvest and manage the same separate and apart from all other property held by it in trust, and pay over the net income and principal thereof as follows:

(1) The whole of the net income thereof to be paid *by* my adopted daughter, Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline during her life quarterly in each and every year together with such portion of the principal of said trust fund as shall

make the amount to be paid her at least Three Thousand Dollars a year during her life, said income to be free from the interference or control of her creditors."

3. The plaintiff, as Trustee under said will, has since qualifying as such Trustee paid to said Fannie Leighton Luke the income of the trust fund as provided in said Article Second Section (1) up to and including the payment made October 10, 1913.

4. On October 31, 1913 an involuntary petition in bankruptcy against said Fannie Leighton Luke was filed in the United States District Court for the District of Massachusetts; on December 3, 1913, she was duly adjudicated a bankrupt and on February 21, 1914, John E. Eaton of Boston in the County of Suffolk was duly appointed trustee in bankruptcy of the estate of said Fannie Leighton Luke, and has duly qualified and is now acting as such trustee.

5. Said John E. Eaton as trustee in bankruptcy claims that by virtue of the bankruptcy proceedings aforesaid the interest of said Fannie Leighton Luke under said Article Second Section (1) of said will passed to him as trustee in bankruptcy of her estate and has demanded that your petitioner make to him the payments which are provided under the terms of said Article Second Section (1) to be made subsequent to said payment of October 10, 1913.

6. Said Fannie Leighton Luke claims that by virtue of
5 the provision contained in said Article Second, Section (1), namely, "said income to be free from the interference or control of her creditors," her interest under said Article Second Section (1) of said will did not pass to said John E. Eaton as Trustee in bankruptcy of her estate, and has demanded that your petitioner make to her the payments provided to be made under the provisions of said Article Second Section (1) subsequent to said payment of October 10, 1913.

Wherefore your petitioner asks this Honorable Court to instruct it fully as to its duty in the premises and especially asks

1. Whether the interest of said Fannie Leighton Luke under said Article Second Section (1) of said will did or did not pass to said John E. Eaton as trustee in bankruptcy of her estate.

2. To whom shall the payments provided for under said Article Second, Section (1) of said will subsequent to said payment made October 10, 1913, be made.

3. For such further instructions, decrees and relief in and concerning the matters hereinbefore set forth or referred to as the nature of the case may require or to this Honorable Court may seem meet.

By Its Attorney, HARTLEY F. ATWOOD.

EXHIBIT A.

I, John W. Leighton, of Brookline, in the Commonwealth of Massachusetts, declare this to be my last will and testament, hereby revoking all wills heretofore made by me.

6 After the payment of my just debts and funeral charges, I give, devise and bequeath as follows:

First: I give, devise and bequeath to my wife, Anaretta T. Leighton, the sum of one hundred thousand dollars in money, together with my wearing apparel, watch, jewelry, household furniture of every description, including articles of ornament, horses, carriages, and equipments, I may die possessed of. I further give, devise and bequeath to my said wife Anaretta T. Leighton a sum equal to the principal and interest of any and all mortgages that may exist at the time of my death upon the premises in Brookline where I now reside at the corner of Tappan Street and Garrison Road said premises being now the property of my wife, and it being my intention that the same shall upon my death be free from any and all mortgages. If for any reason in the settlement of my estate all the legacies given by me cannot be paid in full for want of sufficient funds, I direct that the entire legacies to my wife shall first be paid in full, and all other legacies shall be proportionately diminished.

Second: I give, devise and bequeath to the Boston Safe Deposit and Trust Company, a corporation duly established under the laws of the Commonwealth of Massachusetts and located at Boston, in said Commonwealth, the sum of Seventy-five Thousand Dollars in money, but in trust nevertheless, to invest, hold, re-invest and manage the same separate and apart from all other property held by it in trust, and pay over the net income and principal thereof as follows:

7 (1) The whole of the net income thereof to be paid my adopted daughter, Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline during her life quarterly in each and every year together with such portion of the principal of said trust fund as shall make the amount to be paid her at least Three Thousand Dollars a year during her life, said income to be free from the interference of control of her creditors.

(2) Upon her death the whole of the net income thereof to be paid quarterly in each and every year to the guardian or guardians of any child or children of said Fannie Leighton Luke for the support and maintenance of such children until the eldest child reaches the age of twenty-one years.

(3) When the eldest child reaches the age of twenty-one years, or if and when all of said children die before reaching said age any or all leaving issue then said trust fund is in the first event to be divided equally between the children of said Fannie Leighton Luke then living, the issue of any deceased child taking by right of representation, or in the second event said trust fund is to be divided among the issue then living by right of representation.

(4) In the event of the death of all of said children of said Fannie Leighton Luke before reaching the age of twenty-one years without issue living at the death of the last surviving child the said trust fund is to go into the residue of my estate as provided by the fifth clause of my will.

This legacy to said Boston Safe Deposit and Trust Company is to be paid in full and all other legacies except the legacies to my wife to be proportionately diminished, if necessary

Third: I give, devise and bequeath my burial lot at Fores
8 Hills Cemetery to my wife, Anaretta T. Leighton.

Fourth: I give, devise and bequeath to Anaretta T. Leigh ton, William A. Sargent and Otis H. Luke, the sum of Twelve Thou sand Five Hundred Dollars in money, but in trust, nevertheless, t invest, hold, re-invest and manage the same, and to collect the in come thereof and pay over the net income thereof as follows:

(1) The whole of the net income thereof to be paid my wife dur ing her life.

(2) Upon her death, the then Trustees are to pay over the prin cipal of said sum as follows:

(1) To Martha A. Sargent, if she be then living One Thousand Dollars.

If not living, the same to be paid to her son William A. Sargent.

(2) To the three daughters of Alphonzo G. Frye the sum of Two Thousand Dollars to be equally divided between them or the sur vivor or survivors of them.

(3) To Charles H. Frye Five Hundred Dollars.
(4) To Horatio B. Frye, Fifteen Hundred Dollars.
(5) To John Rice Frye, Five Hundred Dollars.
(6) To Elizabeth K. Cram, One Thousand Dollars.
(7) To Clifton H. Cram, Two Thousand Dollars.
(8) To Edwin Cram, Five Hundred Dollars.
(9) To John W. L. Cram, Five Hundred Dollars.
(10) To Edwin Leighton, One Thousand Dollars.
(11) To Henry Howard Dyer, One Thousand Dollars.
(12) To Daniel Dyer, Five Hundred Dollars.
(13) To Charles Dyer, Five Hundred Dollars.

9 To my sisters Mrs. Flint and Mrs. Stevens I bequeath noth ing as I believe them to be amply provided for.

Fifth: I give, devise, and bequeath to my wife, Anaretta T. Leighton, all the rest, residue and remainder of my property of every name, nature and description.

Sixth: I nominate and appoint my wife, Anaretta T. Leighton, and William A. Sargent of Boston, in said Commonwealth, to be the Executors of this my last will, and direct that my said Executors and Trustees be exempt from giving any sureties on any official bond that may be required of any of them.

I hereby authorize my Executors or Trustees respectively if in the performance of their trust they deem necessary or proper to sell at public or private sale without order of Court thereon any part or all of the estate in their hands, real or personal, and to execute and de liver proper and sufficient deeds and instruments to convey and transfer the same, the purchaser in no event to be accountable for the application of the purchase money.

In Witness Whereof I hereunto set my hand and seal, and in the presence of three witnesses declare this to be my last will and testa ment this Twentieth day of February A. D. 1896.

JOHN W. LEIGHTON. [SEAL.]

On this Twentieth day of February A. D. 1896, the said John W. Leighton signed the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we three do now, at his request, in his presence, and in the presence of each other subscribe our names as witnesses, thirty-six words being interlined on the third page before signing.

JOSEPH WARREN.
FREDERICK H. NIAUX.
CARRIE E. TAYLOR.

A true copy.
Attest:

FRANK B. TALLMAN, [SEAL.]
Notary Public.

This Bill was filed and entered in our said Supreme Judicial Court, on the seventh day of April, A. D. Nineteen Hundred and Fourteen, the plaintiff appearing by Hartley F. Atwood, Esquire, its Attorney:

And a Subpœna was thereupon issued returnable at the Rules holden at Boston aforesaid on the first Monday of May, 1914.

Upon which subpœna service was accepted in writing by the Attorneys for said defendants, as follows, viz:

BOSTON, April 15, 1914.

Service of the within subpœna is hereby accepted.

JOHN E. EATON,
Trustee in Bankruptcy of Estate of
Fannie Leighton Luke,
By His Att'y, GILBERT E. KEMP.

Service of the within subpœna is hereby accepted.

FANNIE LEIGHTON LUKE,
By RAYMOND H. OVESON,
Her Att'y.

April 15, 1914.

BOSTON, Apr. 15, 1914.

Service of the within subpœna is hereby accepted.

JOHN E. EATON,
Trustee in Bankruptcy of Est. of
Fannie Leighton Luke.

And on the twenty-eighth day of said April the defendant John E. Eaton, Trustee, &c. filed his Answer, as follows, to wit:

13 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Equity.

No. 21611.

BOSTON SAFE DEPOSIT & TRUST CO.
vs.
FANNIE LEIGHTON LUKE and JOHN E. EATON, Trustee.

Answer of Respondent John E. Eaton, Trustee.

And now comes the respondent, John E. Eaton, Trustee in Bankruptcy, of the estate of the respondent, Fannie Leighton Luke, and makes this, his answer, to the plaintiff's petition for instructions.

1. The statements and allegations contained in the plaintiff's petition are admitted to be true.

2. Further answering, this respondent says that the income from the trust fund held by the petitioner has been at all times in the past sufficient to make the payment of Three Thousand Dollars ($3,000) per year to the said Fannie Leighton Luke, as provided in said will, so that the principal of said trust remains intact; that on December 3, 1913, the date of the said Fannie Leighton Luke's being adjudicated bankrupt, the Trustee held the sum of Five Hundred Thirty-seven Dollars Forty-two Cents ($537.42) in money as income upon
14 said trust fund which had then been reduced to its possession, and that on said date there were further sums of income earned but uncollected and not reduced to possession by said Trustee, the amount of which is unknown to this respondent.

3. This respondent further says that under and by virtue of the bankruptcy act and the adjudication of the respondent Fannie Leighton Luke bankrupt thereunder, he has succeeded as statutory assignee in bankruptcy to the entire interest of the said respondent Fannie Leighton Luke in and to said trust fund and accrued and future income.

4. This respondent joins in the prayer of the petitioner for instructions and for such other and further relief as to the honorable court may seem proper.

JOHN E. EATON,
Trustee in Bankruptcy of
Estate of Fannie Leighton Luke,
By His Attorney, GILBERT E. KEMP.

14½ And on the eighth day of May, in said year, the defendant Fannie L. Duke filed her Answer, as follows, to wit:

15 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Supreme Judicial Court. In Equity.

No. 21611.

BOSTON SAFE DEPOSIT & TRUST CO.
vs.
FANNIE LEIGHTON LUKE et al.

Answer of Respondent Fannie Leighton Luke.

Your Respondent, Fannie Leighton Luke, admits the statements and allegations contained in the Plaintiff's petition for instructions, and joins in the prayer of the Petitioner for instructions and for such other and further relief as to this Honorable Court may seem meet.

By Her Attorneys, HALE, OVESON & KENDALL.

15½ And on the thirtieth day of June, in said year the parties appeared, and filed their Agreed Statement of Facts, as follows, viz:

16 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Supreme Judicial Court. In Equity.

No. 21611.

BOSTON SAFE DEPOSIT & TRUST COMPANY
vs.
FANNIE LEIGHTON LUKE et al.

Agreed Statement of Facts.

For the purpose of extending the record in the above entitled cause, the following facts are hereby agreed upon by the respective parties and are hereby made a part of the record.

The facts as set forth in the Petitioner's Bill of Complaint are agreed upon as true.

In addition, the following facts are agreed upon:

It has not been necessary for the Petitioner, as Trustee under the will, to draw upon the principal of the Trust Fund for any amount to make up the annual payment of three thousand dollars ($3,000.00) to the beneficiary;

If material to the issues in this case, the following facts and figures are agreed upon as true;

The greater part of the Trust Fund in question consists of real estate mortgages;

On December 3, 1913, the date of adjudication in bankruptcy, the Petitioner, as Trustee under the Will, had collected in cash	$519.50	
Less commission @ 5%	25.98	
		$493.52
17		
There was mortgage interest accruing, but not due	603.43	
" " " " " but not payable, on mortgages overdue and not renewed	91.02	
	694.45	
Less commission @ 5%	34.72	
		659.73
There was mortgage bond interest accruing, but not due	44.77	
Less commission @ 5%	2.23	
		42.54
There was cash on hand at time of making last payment on income, October 10, 1913		17.51
Making a grand total of		$1,213.30

HARTLEY F. ATWOOD,
Attorney for Petitioner.
RAYMOND H. OVESON,
Attorney for Respondent Fannie Leighton Luke.
GILBERT E. KEMP,
Attorney for Respondent John Eaton, Trustee in Bankruptcy.

17½ And on the said thirtieth day of June, after a hearing upon the pleadings, and Agreed Facts, the cause was reserved by the presiding Justice (De Courcy, J.) for the consideration of the Full Court, in the words following, to wit:

18 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Supreme Judicial Court. In Equity.

No. 21611.

BOSTON SAFE DEPOSIT & TRUST COMPANY
vs.
FANNIE LEIGHTON LUKE et al.

Reservation.

The above cause came on to be heard before me, and after hearing arguments of counsel the said cause is reserved upon the agreed state-

ment of facts and upon the pleadings, for the consideration of the full court; such order or decree to be made as law and justice may require.

CHARLES A. DE COURCY,
J. S. J. C.

June 30, 1914.

19 And afterwards, to wit, on the ninth day of March, A. D. Nineteen Hundred and Fifteen, it was ordered by our said Supreme Judicial Court for the Commonwealth, viz:

20 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth.

AT BOSTON, March 9, 1915.

In the case of Boston Safe Deposit & Trust Co. vs. Fannie Leighton Luke et al. pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Let a decree be entered directing the plaintiff to pay to the life tenant the whole income including arrearages. Costs as between solicitor & client to both defendants to be settled by single justice.

By the court.

C. H. COOPER, *Clerk.*

March 9, 1915.

[Endorsed:] 21611 Eq. No. 818 Eq. Supreme Judicial Court for the Commonwealth. Rescript. Suffolk County. Boston Safe Deposit & Trust Co. vs. Luke et al.

20½ And said rescript was entered by our said Court accordingly.

Whereupon the parties appeared, and further hearing being had upon the rescript the following Final Decree was entered by our said Court, viz:

21

Copy.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Equity.

BOSTON SAFE DEPOSIT & TRUST COMPANY
vs.
FANNIE LEIGHTON LUKE and JOHN E. EATON, Trustee in Bankruptcy.

Final Decree.

And now this cause came on to be further heard, and it appearing that the Defendant Fannie Leighton Luke, as life tenant, is entitled to the whole income of the Trust Fund held by the said Plaintiff as Trustee as against the said Defendant John E. Eaton, Trustee in Bankruptcy;

Now, therefore, after hearing counsel and after rescript, and in accordance therewith, it is hereby ordered, adjudged and decreed

I. That the Plaintiff pay the costs and the fees of counsel taxed as between solicitor and client out of the income of the Fund held by it under the will of John W. Leighton for the benefit of said Fannie Leighton Luke, with remainders over, and that the plaintiff, after deducting said expenses and charges, pay over and transfer the remainder of said income, including arrearages, to the said Fannie Leighton Luke.

II. That the following sums are allowed as fees and disbursements:

To Hale, Oveson & Kendall, Attorneys for Fannie Leighton Luke..... $355.
To Gilbert E. Kemp, Attorney for Trustee in Bankruptcy ..... 275.
22 To Hartley F. Atwood, Counsel for the plaintiff.... 75.50

By the Court:

JOHN H. FLYNN,
Ass't Clerk.

March 19, 1915.

Approved, as to form only.
GILBERT E. KEMP,
Att'y for John E. Eaton, Trustee in Bankruptcy of Estate of Fannie Leighton Luke.

We assent to the within decree.
HALE, OVESON & KENDALL,
Att'ys for Fannie Leighton Luke.

Approved:
HARTLEY F. ATWOOD,
Att'y for Petitioners Boston Safe Deposit & Trust Co., Trustee.

23 All and singular which premises we have held good, by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the Seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County, on this thirteenth day of May, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

[SEAL.] JOHN F. CRONIN, *Clerk.*

23½ COMMONWEALTH OF MASSACHUSETTS:

BOSTON, April 7, 1915.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Boston Safe Deposit & Trust Co. vs. Fannie L. Luke et al., decided on the 9th day of March, 1915.

HENRY WALTON SWIFT,
Reporter of Decisions.

24 LORING, *J.*:

The trustee in bankruptcy seeks to take this case out of the decisions of Billings v. Marsh, 153 Mass. 311, and Munroe v. Dewey, 176 Mass. 184, because here the bankrupt's equitable life interest was assignable. There is nothing in the will which forbids the life tenant's assigning her equitable life interest. It follows that it was assignable. Ames v. Clark, 106 Mass. 573; Huntress v. Allen, 195 Mass. 226.

It is the contention of the trustee in bankruptcy that being assignable the life interest passed to him under s. 70-*a* (5) of the bankrupt act, which provides that all "property which prior to the filing of the petition he [the bankrupt] could by any means have transferred" shall vest in the trustee.

But the immunity of the equitable life interest in the case at bar does not depend upon the kind of property which (by the terms of the bankrupt act) passes to the trustee in bankruptcy. The immunity of the equitable life interest goes farther back. It
25 goes back to the fact that this equitable life interest is not subject to bankruptcy proceedings at all. By the terms of the will creating it the equitable life interest here in question is to be "free from the interference or control of her [the life tenant's] creditors." It is immaterial whether the machinery set in motion by the creditors is a bill in equity to reach and apply her equitable interests, or an involuntary petition in bankruptcy to secure all her property legal and equitable. The equitable life estate created by the will here in question is "to be free from the interference or control of her creditors," and under the doctrine of Broadway National Bank v. Adams, 133 Mass. 170, that direction will be enforced. We have examined all the cases cited by the trustee in bankruptcy and find nothing in them which requires notice.

By the terms of the will "the whole income" is to be "free from the interference or control of her [the life tenant's] creditors." The

whole income, including all arrearages, is to be paid to the life tenant.

No question has arisen requiring the court to instruct the trustee as to the use of the principal to make the income up to three thousand dollars.

A decree must be entered directing the plaintiff to pay to the life tenant the whole income, including all arrearages; and it is

So ordered.

26 [Endorsed:] Boston Safe Deposit & Trust Co. vs. Luke. Certified Copy of the Opinion of the Supreme Judicial Court.

27 In the Supreme Court of the United States.

BOSTON SAFE DEPOSIT AND TRUST COMPANY, Plaintiff,
vs.
FANNIE LEIGHTON LUKE et al., Defendants.

Petition for Writ of Error.

Now comes John E. Eaton, your petitioner, a resident of Boston in the County of Suffolk and Commonwealth of Massachusetts, as he is Trustee in bankruptcy of the Estate of Fannie Leighton Luke of Brookline, in the County of Norfolk and said Commonwealth, and respectfully shows unto the Court:

1. That, heretofore, to wit: on the 19th day of March, 1915, in the Supreme Judicial Court for the County of Suffolk in the Commonwealth of Massachusetts, upon the order and direction of the Supreme Judicial Court for said Commonwealth, in a certain cause or Petition for Instructions, in which the Boston Safe Deposit and Trust Company, a corporation organized under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston in the County of Suffolk in said Commonwealth, as Trustee under the will of John W. Leighton, deceased, late of Brookline, in the County of Norfolk in said Commonwealth, was Plaintiff, and your petitioner and said Fannie Leighton Luke were the defendants therein, a final judgment or decree was rendered against the
28 claims and contention of your petitioner and in favor of the said Fannie Leighton Luke.

2. That the issue between the parties in the controversy in said Supreme Judicial Court is fully set forth in a record of the proceedings in said Supreme Judicial Court duly certified by the Clerk of said Court, to be filed herewith, and said record is made a part of this petition.

3. That the matters contained and set forth in the aforesaid Petition for Instructions and in the answers filed thereto came on to be heard before a single Justice of said Court, sitting at Boston, within and for the County of Suffolk in said Commonwealth, and thereafter decision thereon was reserved for the consideration of the full court, that being the Supreme Judicial Court for the Commonwealth of

Massachusetts and the highest judicial tribunal in said Commonwealth, and thereupon, agreeably to the practice of said court, briefs were filed by the petitioner and by the said Defendant in error, Fannie Leighton Luke, and the cause came on to be heard before said Supreme Judicial Court for said Commonwealth, and was argued by counsel, and thereafter on the 9th day of March, 1915, rescript was directed to be filed ordering the Clerk of the Supreme Judicial Court for the County of Suffolk to make the following entry: "Ordered that the Clerk of said Court in said County make the following entry in said cause in the docket of said Court, viz: Let a decree be entered directing the Plaintiff to pay to the life tenant the whole income including arrearages; costs as between solicitor and client to both Defendants, to be settled by single Justice.

By the Court:

C. H. COOPER, *Clerk.*"

29 And thereafter on the 19th day of March, 1915, a final decree was entered in the Supreme Judicial Court for the County of Suffolk, as appears in the certified record, and said Supreme Judicial Court for the County of Suffolk is the highest Court of said Commonwealth of Massachusetts in which a final decree in said controversy could be had.

4. That upon the hearings had before said single Justice and before the said Supreme Judicial Court for the Commonwealth, it was claimed by the petitioner that the life interest of said Defendant in error, Fannie Leighton Luke, under the provisions contained in said will as hereinbefore set forth, was an assignable interest and that the petitioner as Trustee in Bankruptcy of said Defendant in error, Fannie Leighton Luke, had become vested by operation of law with her entire life interest.

5. The petitioner further says that the said Supreme Judicial Court for the Commonwealth of Massachusetts did hold and rule that said life interest of said Defendant in error, Fannie Leighton Luke, under the provisions in said will was an assignable interest; but further held and ruled that said equitable life estate was immune from and not affected by the Bankruptcy Act and did not pass to the petitioner as Trustee in bankruptcy of the estate of said Defendant in error, Fannie Leighton Luke, and this ruling of said Supreme Judicial Court for the Commonwealth of Massachusetts was made to apply to all arrearage of income in the hands of the said Defendant in error, Boston Safe Deposit and Trust Company, as Trustee. And your

30 petitioner further says that the amount involved is more than Two thousand ($2,000) dollars.

6. And your Petitioner claims the right to remove said judgment, decree and proceedings in said cause to the Supreme Court of the United States by writ of error under the Statutes of the United States, authorizing writs of error to said Court, namely, Section 709 of the Revised Statutes of the United States, for the reason that in the matter of said suit, action, controversy or petition for instructions, and at all hearings thereon, a right, privilege or title was specially set up and claimed by your petitioner under the provisions contained in

Section 70-A of Chapter 541 of the Statutes of 1898 of the United States, the same being a provision contained in that law of the United States known as the Bankruptcy Act, and that provisions of said law of the United States were drawn in question in the issue and controversy between the parties, and that the said Supreme Judicial Court for the Commonwealth of Massachusetts by its judgment or decree has denied unto your petitioner the right, privilege or title claimed by him as aforesaid, all of which appears by the record of the proceedings in said cause in said Supreme Judicial Court, and by so doing the said Supreme Judicial Court did act contrary to the legal effect, intent, meaning and purpose of the aforesaid provisions contained in said Bankruptcy Act, and by said judgment or decree did thereby commit error to the great damage of the Petitioner.

Wherefore your petitioner files herewith his assignment of errors to accompany a writ of error and prays that a writ of error may issue returnable unto the Supreme Court of the United States for
31 the correction of the errors complained of, that a citation may issue to said Defendants in error, Boston Safe Deposit and Trust Company, Trustee, and said Fannie Leighton Luke, that it may be determined whether or not your petitioner shall be required to file with his petition any bond or security upon the allowance of said writ of error, and if so that the amount and the security thereof be fixed and approved and that a transcript of the record proceedings and papers in said suit in said Supreme Judicial Court, duly authenticated may be sent to the Supreme Court of the United States.

JOHN E. EATON,
Trustee in Bankruptcy of Estate of
Fannie Leighton Luke.

GILBERT E. KEMP,
Of Counsel.

April 14, 1915.

Allowed.

OLIVER WENDELL HOLMES,
Justice Sup. Ct. of U. S.

A true Copy. Attest:

——— ———.

32 In the Supreme Court of the United States.

BOSTON SAFE DEPOSIT & TRUST COMPANY, a Corporation Established under the Laws of the Commonwealth of Massachusetts and Having Its Usual Place of Business at Boston, in the County of Suffolk, as It Is Trustee under the Will of John W. Leighton, Late of Brookline, in the County of Norfolk, Deceased, Plaintiff,

v.

FANNIE LEIGHTON LUKE, of said Brookline, and JOHN E. EATON, of said Boston, as He Is Trustee in Bankruptcy of the Estate of said Fannie Leighton Luke, Defendants.

Assignment of Errors and Prayer for Reversal.

Now comes John E. Eaton, as he is Trustee in bankruptcy of the estate of Fannie Leighton Luke, petitioner for a writ of error to the Supreme Judicial Court of the Commonwealth of Massachusetts, and says that the said Supreme Judicial Court of the Commonwealth of Massachusetts in rendering its decision and judgments in the case therein pending wherein the said Defendant in error, Boston Safe Deposit and Trust Company, was petitioner for instructions, and John E. Eaton, your present petitioner, as Trustee in bankruptcy of the estate of Fannie Leighton Luke, and said Fannie Leighton Luke were Defendants, erred in the following particulars, to wit:—

1. The said Supreme Judicial Court of the Commonwealth of Massachusetts erred in making and rendering its judgment and directing a decree whereby said Boston Safe Deposit and
33 Trust Company was ordered and directed to pay to the life tenant the whole of the life income, including arrearages.

2. The said Supreme Judicial Court erred in not making and rendering a judgment and directing a decree that the said Boston Safe Deposit and Trust Company should pay to the Plaintiff in error as Trustee in bankruptcy of the estate of the said Fannie Leighton Luke, all payments of income accruing under the provisions contained in Article 2 and Section 1 thereof of the will of John W. Leighton, for the life of the said Fannie Leighton Luke.

3. That the said Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and ruling that the said Fannie Leighton Luke was entitled, notwithstanding her adjudication as bankrupt, to all income that had accrued to the date of her adjudication in bankruptcy, namely, December 3rd. 1913.

4. The said Supreme Judicial Court of the Commonwealth of Massachusetts erred in its judgment in not holding, ruling and directing that a decree be entered awarding to your petitioner, as Trustee in bankruptcy of the estate of said Fannie Leighton Luke, all income that had accrued under the provisions in Article 2, including Section 1 thereof in said will up to the date of her adjudication as bankrupt, namely, December 3rd, 1913.

5. The said Supreme Judicial Court of the Commonwealth of

Massachusetts erred in its judgment in holding and ruling that the equitable life interest which prior to her bankruptcy was vested in the said Defendant in error, Fannie Leighton Luke, was not subject to or affected by the bankruptcy proceedings at all.

34 6. The said Supreme Judicial Court for the Commonwealth of Massachusetts erred in its judgment by not holding and ruling that the right or title to the equitable life interest in question being an assignable interest vested by operation of law in the petitioner as Trustee in bankruptcy of the estate of said Fannie Leighton Luke.

7. The said Supreme Judicial Court of the Commonwealth of Massachusetts erred in its judgment or decree in not giving full legal effect to the provisions contained in Section 70-A of the Bankruptcy Act, the same being Chapter 541 of the United States Statutes of 1898.

8. That unless the errors hereinbefore set forth and complained of are corrected your petitioner will be deprived of property rights of great value.

Wherefore the petitioner in error humbly prays this Honorable Court that the judgment and decree of the Supreme Judicial Court of the Commonwealth of Massachusetts and the final decree entered pursuant thereto by the single Justice of the Supreme Judicial Court of the County of Suffolk may be reversed and corrected, and that the petitioner in error may be granted such relief as the law in this behalf requires.

JOHN E. EATON,
Trustee in Bankruptcy of Estate of Fannie Leighton Luke.

GILBERT E. KEMP,
Of Counsel.

A true Copy. Attest:

——— ———.

35 (*Bond on Writ of Error.*)

Know all men by these presents:

That we, John E. Eaton of Boston, in the County of Suffolk and Commonwealth of Massachusetts, as Trustee in Bankruptcy of the Estate of Fannie Leighton Luke, and Equitable Surety Company, a corporation organized under the laws of the State of Missouri, and having a usual place of business in said Boston, as surety, are held and firmly bound unto Boston Safe Deposit and Trust Company, a corporation organized under the laws of Massachusetts, and having a usual place of business in said Boston, Trustee under the will of John W. Leighton, and Fannie Leighton Luke of Brookline, Massachusetts, in the full and just sum of Five hundred ($500) dollars, to be paid to the said Boston Safe Deposit and Trust Company, Trustee, and said Fannie Leighton Luke, their certain Attorneys, Executors, Administrators, successors or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs,

Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the twenty-fourth day of March in the year of our Lord one thousand nine hundred and fifteen.

Whereas lately in the Supreme Judicial Court for the County of Suffolk and Commonwealth aforesaid, at the direction of the Supreme Judicial Court of the Commonwealth of Massachusetts, in a suit depending in said Court between Boston Safe Deposit and Trust Company, Trustee, Petitioner for Instructions, and said John E. Eaton, Trustee in Bankruptcy aforesaid, and Fannie Leighton Luke, Respondents therein, a decree was entered in favor of the said Fannie Leighton Luke against the said John E. Eaton, Trustee, and
36 the said John E. Eaton, Trustee, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment or decree in the aforesaid suit, and a citation directed to the said Supreme Judicial Court, citing and admonishing the Defendants therein to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next;

Now the condition of the above obligation is such that if the said John E. Eaton, Trustee as aforesaid, shall prosecute his said writ of error to effect, and answer all damages and costs, if he fails to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOHN E. EATON, [SEAL.]
As Trustee Aforesaid.
EQUITABLE SURETY COMPANY, [L. S.]
By A. A. DORITY, *Att'y in Fact.*

Signed sealed and delivered in presence of
[SEAL.] —— ——.

Approved:

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme
Judicial *Court of the United States.*

37 UNITED STATES OF AMERICA, *ss:*

To Boston Safe Deposit & Trust Company, as it is Trustee under the will of John W. Leighton, deceased, and Fannie Leighton Luke, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Judicial Court of the State of Massachusetts, wherein John E. Eaton, as he is Trustee in Bankruptcy of the estate of Fannie Leighton Luke, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error men-

tioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this fourteenth day of April, in the year of our Lord one thousand nine hundred and fifteen.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, April 17th, 1915.

I hereby certify that I have this day served the within citation on the within-named Boston Safe Deposit and Trust Company, by giving in hand to Marvin Sprague, Trust Officer, thereof, a true and attested copy of this citation, at 100 Franklin Street, Boston, in said District.

JOHN J. MITCHELL,
U. S. Marshal,
By JAMES A. TIGHE, *Deputy.*

[Endorsed:] United States Marshal's Office, P. O. Building, Boston, Mass., Apr. 17, 1915. Marshal's No. 41, Civil. U. S. Marshal's Civil Docket No. 207, So. Dis't of New York. Gilbert E. Kemp, 161 Devonshire St., Boston.

Form No. 302.

I hereby certify, That on the 26" day of April, 1915, at the City of New York, in my district, I personally served the within citation upon the within-named Fannie Leighton Luke at #201 West 87" Street, New York City, by exhibiting to her the within original, and at the same time leaving with her a copy thereof.

THOMAS D. McCARTHY,
United States Marshal, Southern District of New York.

Dated April 26, 1915.

J. W. P.

[Endorsed:] 21611 Eq. Boston Safe D. and T. Co. vs. Luke et al. Suffolk, ss: Supreme Judicial Court. Filed April 30, 1915. John F. Cronin, clerk.

38 *Præcipe.*

To the Clerk of the Supreme Judicial Court within and for the County of Suffolk:

Please incorporate into the transcript of the record, to accompany your return to the writ of error, the reservation to the Supreme Judicial Court, the Agreed statement of facts, the rescript and final

decree besides copies of petition for writ of error, assignments of error, bond and citation and proceedings thereon, and copy of opinion of full bench the Counsel for the plaintiff in error deeming the above portions of the record to be material to and necessary for a decision of the questions involved.

You may also annex a copy of the pleadings.

Yours respectfully,

GILBERT E. KEMP,
Counsel for Plaintiff in Error.

May 11, 1915.

[Endorsed:] Suffolk, ss: Supreme Judicial Court. Filed May 11, 1915. John F. Cronin, clerk.

39 *Affidavit of Service.*

I, Gilbert E. Kemp, Counsel for the plaintiff in error declare and state that I have served a copy of the foregoing præcipe on the defendants by sending a copy thereof to Hartley F. Atwood, Esq., 53 State St., Boston, Mass., and to Raymond H. Oveson, Esq., 15 State St., Boston, Mass. Counsel of record for the defendants in error, Boston Safe Deposit and Trust Company and Fannie Leighton Luke.

GILBERT E. KEMP.

BOSTON, May 11, 1915.

Then personally appeared the above named Gilbert E. Kemp and made oath that the foregoing statements by him subscribed are true. Before me,

[Seal William J. Barry, Notary Public, Commonwealth of Massachusetts, U. S. A.]

WILLIAM J. BARRY,
Notary Public.

[Endorsed:] Suffolk, ss: Supreme Judicial Court. Filed May 11, 1915. John F. Cronin, clerk.

40 *Certificate of Lodgment.*

Supreme Judicial Court.

I, John F. Cronin, do hereby certify that there was lodged with me as such clerk on April 17, 1915, in the matter of Boston Safe Deposit and Trust Company vs. Fannie L. Luke et al.

1. The original bond of which a copy is herein set forth.
2. Two copies of the Writ of Error as herein set forth one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this thirtieth day of April, in the year of our Lord One thousand nine hundred and fifteen.

[SEAL.] JOHN F. CRONIN, *Clerk.*

41 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of Boston Safe Deposit and Trust Company, Complainant, vs. Fannie L. Luke et al., Respondents, in said Supreme Judicial Court determined; and attached thereto, and transcribed with said record, is a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this thirteenth day of May in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JOHN F. CRONIN, *Clerk.*

Endorsed on cover: File No. 24,730. Massachusetts Supreme Judicial Court. Term No. 466. John E. Eaton, trustee in bankruptcy of the estate of Fannie Leighton Luke, plaintiff in error, vs. Boston Safe Deposit & Trust Company, trustee under the will of John W. Leighton, deceased, and Fannie Leighton Luke. Filed May 15th, 1915. File No. 24,730.

12

Supreme Court of the United States.

October Term, 1915.

No. 466.

JOHN E. EATON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FANNIE LEIGHTON LUKE,
PLAINTIFF IN ERROR,

v.

BOSTON SAFE DEPOSIT & TRUST CO., TRUSTEE UNDER THE WILL OF JOHN W. LEIGHTON, DECEASED, AND FANNIE LEIGHTON LUKE,
DEFENDANTS IN ERROR.

In Error to the Supreme Judicial Court of Massachusetts.

Brief for Plaintiff in Error upon Motion to Dismiss the Writ of Error or to Affirm the Judgment or to Transfer to the Summary Docket.

ADDISON C. GUTCHELL & SON, LAW PRINTERS, BOSTON, MASS.

Supreme Court of the United States.

October Term, 1915.

No. 466.

JOHN E. EATON, Trustee in Bankruptcy of the Estate of Fannie Leighton Luke,
PLAINTIFF IN ERROR,

v.

BOSTON SAFE DEPOSIT & TRUST COMPANY, Trustee under the Will of John W. Leighton, Deceased, and FANNIE LEIGHTON LUKE,
DEFENDANTS IN ERROR.

In Error to the Supreme Judicial Court of Massachusetts.

Brief for Plaintiff in Error upon Motion to Dismiss the Writ of Error or to Affirm the Judgment or to Transfer to the Summary Docket.

THE PRESENT ISSUE.

This cause is before the Court for the consideration of motions filed by the defendant in error Fannie Leighton Luke; as follows:

First. To dismiss the writ of error herein on the ground that this Court has not jurisdiction thereof, no federal question being involved therein.

Second. To affirm the judgment of the Supreme Judicial Court of Massachusetts on the ground that it is manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depends are so frivolous as to need no further argument.

Third. To transfer the cause for hearing to the summary docket if the Court should decline to dismiss or affirm, as it does not justify extended argument.

STATEMENT OF FACTS.

A fair statement of the facts has been set forth in the brief heretofore filed by said defendant in error.

I.

The Plaintiff in Error Opposes the Motion to Dismiss the Writ of Error.

A FEDERAL QUESTION IS INVOLVED.

The plaintiff in error has claimed, in the state Court, a right or immunity under a law of the United States, and it has been denied to him.

The law applicable to the case at bar has been plainly stated in the case *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U.S. 281, at 293; as follows:

> "The principles to be derived from the cases are these; whether a party to a litigation in a State Court insists by way of objection to, or requests for instructions upon a construction of a statute of the United States which will lead, or on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of

the State, then the question thus raised may be reviewed in this court.

"The plain reason is that in all such cases, he has claimed in the State Court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the constitution and so explicitly conferred by act of Congress needs no justification, but it may not be out of place to say that in no other manner can a uniform construction of the Statute laws of the United States be secured so that they shall have the same meaning and effect in all the States of the Union."

See also *Nutt* v. *Knutt*, 200 U.S. 12.

Rector v. *City Deposit Bank*, 200 U.S. 405, 411.

Eau Claire Nat. Bank v. *Jackman*, 204 U.S. 522.

Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U.S. 300.

The question in the case at bar is whether the life estate of the bankrupt was of such a character as to pass to the trustee in bankruptcy, and this involves a federal question.

The position of the plaintiff in error seems to be fully borne out by the decision of the Court, and is sustained by the reasoning of the Court in the case *Cramer* v. *Wilson*, 195 U.S. 408, at 416, where Mr. Justice BROWN, in the opinion, says:

"We have repeatedly held that, when the question in a State Court is not whether, if the bankrupt had title, it would pass to his assignee, but

whether he had title at all, and the State Court decided that he had not, no Federal question is presented."

And in the same opinion the justice, referring to a case in which the question was, in principle, similar to the one in the case at bar, said, at page 416:

> "In *Williams* v. *Heard*, 140 U.S. 529, relied upon by the plaintiff in error, the property in dispute belonged admittedly to the bankrupt, and the question was *whether it was of such a character as to pass to their assignee. Of course, this involved a construction of the bankrupt act.*"

II.

The Plaintiff in Error Opposes the Motion to Affirm the Judgment of the State Court.

THE PLAINTIFF IN ERROR ASSERTS:

1. That the life interest of said defendant in error, Fannie Leighton Luke, passed, by operation of law, to the plaintiff in error as trustee in bankruptcy of her estate.

2. That the said *life interest* is not *exempt property* within the meaning of section 6, or of section 70*a*, of the Bankruptcy Act.

3. That the burden is upon the said defendant in error to show from the record that any exemption relied upon was duly claimed by the bankrupt.

4. That this Court will not review the ruling of the state Court, that the said life interest was an assignable interest, as this part of the decision of the state Court involves no federal question.

5. That the plaintiff in error is, in any event, entitled

to the accrued income in the hands of the defendant in error Boston Safe Deposit & Trust Company on December 3, 1913, the date of the adjudication in bankruptcy.

ARGUMENT.

The Bankruptcy Act, sec. 70*a*, provides as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . .
>
> "(3.) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;
>
> "(4.) property transferred by him in fraud of his creditors;
>
> "(5.) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

In commenting upon the effect of the language used in subsection 5 of section 70*a* of the Bankruptcy Act Collier says:

> "It will be noted that the words here are very general, and seem to include every vested right and interest attaching to or growing out of property."
>
> Collier on Bankruptcy (10th ed. 1914), Law and Practice, p. 1004.

In determining whether property does or does not pass to the trustee in bankruptcy Collier says, "the test is simple and easily applied." It is: "Could the property in question have been transferred by, or levied upon and sold under judicial process against, the bankrupt? If so, it passes to the trustee; if not, it does not."

Collier on Bankruptcy (10th ed.), p. 1005.

To the same effect see —

Loveland on Bankruptcy, vol. 1, p. 823.

See also *Clark* v. *Williams*, 190 Mass. 219.

Remington on Bankruptcy (2d ed.), secs. 966, 972.

In the case *In re Jersey Island Packing Co.* (C.C.A. 9th Cir.), 138 Fed. Rep. 625, at 627, the Court say:

> "The beneficial interest of a bankrupt in property held in trust passes, also, in all cases where that interest might have been transferred to another by the bankrupt, or might have been levied upon under judicial proceedings against him."

THE TRUSTEE IN BANKRUPTCY IS NOT A CREDITOR.

The Bankruptcy Act declares his status: that he "shall be vested by operation of law with the title of the bankrupt."

It has been held that a receiver under New York supplemental proceedings is not a creditor within the meaning of a state statute authorizing a certain proceeding in the nature of a creditor's bill.

Masten v. *Amerman*, 51 Hun, 244.

In referring to the trustee in bankruptcy, as related to the interests of the bankrupt and of creditors, Collier says:

> "He represents both the bankrupt and creditors, he succeeds to the right and title of the bankrupt for the benefit of his creditors, and in this capacity occasionally has rights not possessed by the bankrupt, as for instance, the right to recover assets which the bankrupt has conveyed in fraud of his creditors."

Collier on Bankruptcy (10th ed.), p. 1002.
Cowan v. *Burchfield* (D.C. Ala), 180 Fed. Rep. 614.

His interests are also greater than those of the creditors, for he has a title, and also all creditors' rights of action as to property fraudulently transferred.

Collier on Bankruptcy (10th ed.), pp. 1002, 1003.
In re Rodgers (C.C.A. 7th Cir.), 125 Fed. Rep. 169.

It has been held that the owner's interest in growing crops will pass to the trustee, although, under the statutes of Tennessee, they cannot be levied upon before a certain date, the reason being that the interest is assignable.

In re Burnett (D.C. Tenn.), 201 Fed. Rep. 162.

The trustee does not take as a bona-fide purchaser for value. He takes property as the bankrupt had it at the time of the petition.

Zartman v. *First Nat. Bank of Waterloo*, 216 U.S. 134.
Thompson v. *Fairbanks*, 196 U.S. 516.

UNDERLYING PRINCIPLES.

The Bankruptcy Act comprises a system of laws for the taking possession of the assets of an insolvent, either upon his own initiative, or, in case he has done certain acts called "Acts of Bankruptcy," considered by law to demonstrate his unworthiness or incapacity to manage his business or property, upon the initiative of his creditors; for the recovering property fraudulently conveyed or transferred, including unlawful preferences, the distribution of the proceeds equitably among the creditors; and, finally, for granting to the bankrupt a discharge from all, or the unpaid deficiency of, his debts.

Introduction to Remington on Bankruptcy (2d ed.), p. 16.

It makes no difference that the defendant in error Luke was an involuntary bankrupt, as the commission of the act of bankruptcy was either a voluntary act or may be reckoned as the equivalent of a voluntary act; therefore it does not lie in the mouth of the bankrupt to say that this enables creditors to do indirectly what they may not do directly, for she herself furnished the foundation upon which the bankruptcy proceedings rested; and in this respect her position is no better, from her standpoint, than if she had filed a voluntary petition to be adjudged bankrupt.

The Courts have recognized in numerous cases that the widest possible scope in the classification of prop-

erty that would pass to the trustee in bankruptcy was intended by the provisions contained in the Bankruptcy Act.

A point often overlooked by counsel is that the law furnishes a consideration to the bankrupt in return for the assets or estate taken from him, in that it gives to him a discharge from all his debts. It therefore takes from him, in some cases, property that the creditors might not reach and sell by ordinary judicial process in the several states.

The provision of subdivision (5) of section 70*a* of the Act —

> "(5) Property which prior to the filing of the petitions he could by any means have transferred or which might have been levied upon and sold under judicial process against him" —

although in itself very broad and sweeping, is given added force when combined with the evident purpose and intent of Congress as shown by the class of property included under the terms of subdivision (3) of said section:

> "(3) Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person."

That is, in consideration of the discharge from his debts which the law gives him, it provides for the statutory transfer from him of all his vested rights and interests in property, including all that he could, by any voluntary act of his, transfer to the trustee in bankruptcy.

II.

Exemptions.

The argument of counsel for the defendant in error, first, that the life estate is immune from and not affected by bankruptcy proceedings, and secondly, that the life interest is exempt property (see pages 8–12 and 12–15, inclusive, of Brief of Defendant in Error), is inconsistent.

The first argument bases immunity upon the claim made by counsel (p. 10 of Defendant in Error's Brief), using these words:

> "The National Bankrupt Act cannot subject to the claims of creditors of A the property of B."

The counsel here seeks to defeat the intention of Congress by the claim that the property interest sought to be reached is the property of the *donor* of the life interest, while in his second argument (pp. 12–15) he relies upon exemptions of property belonging to the debtor, claiming that the life interest in question falls under this head. There is no provision by statute in Massachusetts affecting the rights of creditors in reaching the kind of estate in question, as there is in the states of New York, Pennsylvania, Tennessee, and Illinois.

Counsel for the defendant in error Luke has quoted a portion of Massachusetts Revised Laws, c. 167, sec. 38 (Defendant in Error's Brief, p. 14), and declares that "this is a statutory recognition of personal property which from its nature has been considered exempt according to the principles of the Common law."

We will go one step farther, and quote the provision authorizing levy and sale on execution.

Massachusetts Revised Laws, c. 177, sec. 31:

> "All property which by the common law is liable to be taken on execution may be taken and sold thereon except as otherwise expressly provided."

Counsel for the defendant in error claims (p. 14 of Brief) that—

> "It cannot be disputed that a spendthrift Trust is within Massachusetts Revised Laws Chapter 167 section 38. It is that kind of a debtor's personal estate which from its nature has been considered as exempt according to the principles of the common law as adopted and practiced in Massachusetts."

By Massachusetts Revised Laws, c. 159, sec. 3, and clause 7 thereof, it is provided that—

> "The supreme judicial court and the superior court shall have original and concurrent jurisdiction in equity of the following cases; . . . "

Clause 7:

> "Suits by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within or without this Commonwealth, which cannot be reached to be attached or taken on execution in an action at law."

The provisions of Massachusetts Revised Laws, c. 167, sec. 38, quoted in behalf of defendant in error, were never intended to apply in any way to an equitable life interest.

The conclusion which counsel for the defendant in error seeks to force upon the Court seems to be based upon the assumption that the doctrine relating to the carrying into effect of a testator's intention as expressed in *Nichols* v. *Eaton* and in *Broadway National Bank* v. *Adams*, *infra*, is a doctrine having its origin in the common law, and if this be true it must necessarily have been adopted in this country at the time of the organization of the Confederation and the establishment of our system of jurisprudence. The history of the development of this doctrine disproves the claim made by the counsel for the defendant in error.

The personal estate referred to in said Revised Laws, c. 167, sec. 38, as —

> "*Except such personal property as from its nature or situation, has been considered as exempt*" —

comprises certain kinds of property that could not be readily attached without great inconvenience or injury, as sheaves of corn in a cock or barn (*Campbell* v. *Johnson*, 11 Mass. 184); hides in a vat for tanning (*Bond* v. *Ward*, 7 Mass. 123); partnership property in a suit against one of the partners (*Pond et al.* v. *Kimball*, 101 Mass. 105); or property turned over by one arrested, while in the custody of an officer (*Morris* v. *Penniman*, 14 Gray, 220).

The argument of counsel is in other respects misleading as applied to the case at bar.

It rests upon the theory that the common law, as adopted and practised in Massachusetts, has developed a rule of property exempting a part of a debtor's own personal property from creditors. We answer that the decision of the leading case in this Court, *Nichols* v. *Eaton*, 91 U.S. 716, and the leading case in Massachusetts, *Broadway Nat. Bank* v. *Adams*, 133 Mass. 170, proceeded upon the principle that it was not the purpose of the Court to declare an exemption in favor of the debtor as against a creditor, but rather to adjudicate that where a testator had in apt words so circumscribed the equitable life interest granted to the object of his bounty by provisions against the power of disposition or alienation by the beneficiary, and by providing that the income therefrom should be free from interference or control of the creditors of the beneficiary, the Courts will uphold the provisions as valid because of the rights of the testator.

It cannot be said that the Courts have established a rule of property creating an exemption in favor of a debtor.

> See language used by Mr. Justice MILLER in the opinion in the case *Nichols* v. *Eaton*, 91 U.S. 716, at 726: "We are not called upon in this connection to say how far we would feel bound in a case originating in a State where the doctrine of the English Courts had been adopted so as to become a rule of property, *if such a proposition could be predicated of a rule like this.*"

It cannot be said that the state Court of Massachusetts has established a *rule of property*.

The case at bar is the first in which it has held that a life interest was assignable, but, nevertheless, would not pass to a trustee in bankruptcy of the life tenant.

Courts have not the power to legislate, and can no more add an exemption not fairly within the statute than they can take from the statute.

> *In re Gerber*, 186 Fed. Rep. 693 (C.C.A. Wis.).
>
> Remington on Bankruptcy (2d ed.), sec. 1077.

There had previously been four general classes of cases considered in Massachusetts where the life interests were safeguarded:

a. Where the income was payable only at the discretion of the trustee and might be cut off in case of an attempted assignment or bankruptcy.

b. Where the income was to be free from control of creditors, and not attachable and not capable of being assigned.

c. Where the income was to be payable to the beneficiary personally and only upon his personal receipt.

d. Where the provision was clearly for support and maintenance.

So far as the effect of the decision of the Massachusetts Court in the case at bar is considered as establishing a rule of property, it should be borne in mind that this decision was given contrary to the express terms of, and during the operation of, the present bankrupt

law; and under such circumstances a new rule of property cannot be created.

See *In re Gerber*, 186 Fed. Rep. 693.

The state Court has not construed the provisions of any exemption law of the state. It has merely asserted what it regards as a declaration or principle of law.

This Court is not bound, therefore, by rules of procedure, to follow the state Court's decision.

Remington on Bankruptcy (2d ed.), sec. 1043.
Page v. *Edmunds*, 187 U.S. 596.
In re Gerber, 186 Fed. Rep. 693.

The exemptions meant by section 6 of the Bankruptcy Act are those provided for by the state statutes. Section 6 provides that —

> "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition."

In *Smalley* v. *Langenour*, 196 U.S. 93, at 97, Mr. Chief Justice FULLER, in the opinion of the Court, after quoting section 6 of the Bankruptcy Act, said:

> "The rights of a bankrupt to property as exempt are those given him by the State Statutes."

See also *Richardson* v. *Woodward* (C.C.A. 4th Cir.), 104 Fed. Rep. 873.

III.

The defendant in error has not shown, and the record fails to show, that any claim of exemption of the life interest was ever filed in the bankruptcy proceedings.

The contention of the defendant in error, as shown in the petition for instructions (Record, p. 4) and in the decision of the state Court (Record, p. 13), was that the property was not subject to bankruptcy proceedings at all.

Not only has the defendant in error failed to establish — the burden being upon her to do so — that she duly claimed an exemption in the Bankruptcy Court, but the inference is strong that she did not do so.

It is provided by section 7 of the Act that an involuntary bankrupt shall file schedules, including "a claim for such exemptions as he may be entitled to," within ten days after his adjudication as bankrupt, unless further time is granted.

The duty is upon the bankrupt to claim exemptions in accordance with the provisions of the Act.

Remington on Bankruptcy (2d ed.), sec. 1048.
In re Baughman, 183 Fed. Rep. 668.

IV.

The Decision of the State Court Holding the Life Interest Assignable is Not Subject to a Review in this Court.

It involves no federal question, and only such parts of the decision as do involve a federal question will be considered.

Leathe v. *Thomas*, 207 U.S. 98.
Sauer v. *New York*, 206 U.S. 536, 545, 546.

V.

The plaintiff in error submits that the ruling that the title to accrued income in the hands of the trustee on the date of adjudication in bankruptcy (December 3, 1913, see Record, pp. 10, 13) did not pass to him as trustee in bankruptcy was erroneous.

Also that the same principles would apply as apply to the division of income between the estate of a life tenant and a successor. The nature of the trust estate was such that income must be deemed to have accrued from day to day.

See *Welch* v. *Apthorpe*, 203 Mass. 249.

VI.

In considering the authorities cited by the defendant in error we respectfully call the Court's attention to the fact that the decision of the Massachusetts Court in the case *Perkins* v. *Hays*, 3 Gray, 405 (cited in Defendant in Error's Brief, p. 18) has been explained and its effect corrected in the case of *Endicott* v. *U. of Va.*, 182 Mass. 156, 157.

The argument of the defendant in error, accompanied by the reference to numerous Massachusetts cases, seems to proceed partially upon the theory that the plaintiff in error is seeking to controvert the effect of those decisions, but this is not so. We recognize as law the principles laid down in *Nichols* v. *Eaton* and *Broadway Nat. Bank* v. *Adams, supra*, as applied to the facts of each successive case.

The point at issue in the present case differs so materially from previous Massachusetts cases that they cannot be considered as governing its decision.

The other cases cited in the brief of defendant in error, arising in the states of New York, Pennsylvania, Tennessee, and Illinois, are affected by the statutes of the respective states and hence cannot govern.

SUMMARY OF ARGUMENT.

The plaintiff in error submits that:

I. A federal question is involved in this case.

II. This Court is not bound by any rule of procedure to follow the state Court's decision.

III. The life interest in question passed to him as trustee in bankruptcy.

IV. It is not exempt property within the meaning of sections 6 or 70*a* of the Bankruptcy Act.

V. No claim of exemption has been duly filed, and the burden was on the bankrupt so to do.

VI. This Court will deal only with federal questions involved; therefore the state Court decision that the interest was assignable is final.

VII. The right of the plaintiff in error to the accrued income to the date of adjudication must be recognized in any event.

CONCLUSION.

The plaintiff in error submits that the motions to dismiss the writ of error and to affirm the judgment of the state Court should be overruled, but has no objection to the allowance of the motion to transfer said cause to the summary docket for hearing.

Respectfully submitted,
GILBERT E. KEMP,
of Counsel.

Copy of foregoing brief of argument and authorities received this 18th day of February, 1916.

RAYMOND H. OVESON,
Attorney of Record
For Defendant in Error
FANNIE LEIGHTON LUKE.

SUBJECT INDEX

LIST OF CASES CITED

Supreme Court of the United States.

OCTOBER TERM, 1915. No. 466.

JOHN E. EATON, Trustee in Bankruptcy of the Estate of Fannie Leighton Luke, Plaintiff in Error,

vs.

BOSTON SAFE DEPOSIT & TRUST CO., Trustee under the Will of John W. Leighton, Deceased, and FANNIE LEIGHTON LUKE, Defendants in Error.

MOTION TO DISMISS THE WRIT OF ERROR OR TO AFFIRM THE JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, Fannie Leighton Luke, by her attorney of record herein, and moves this honorable Court:

First. To dismiss the writ of error herein on the ground that this Court has not jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Supreme Judicial Court of Massachusetts on the ground that it is manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depend are so frivolous as to need no further argument.

Third. To transfer the cause for hearing to the summary docket, if the Court should decline to dismiss or affirm, as it does not justify extended argument.

By her Attorney,

RAYMOND H. OVESON.

NOTICE OF MOTION

The plaintiff in error is hereby notified that the defendant in error, Fannie Leighton Luke, will, on the twenty-eighth day of February, 1916, on the convening of the Supreme Court of the United States, on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said Court the foregoing motions, and each of them, and the brief in support thereof.

RAYMOND H. OVESON,

Attorney of Record for Defendant in Error.

Copy of foregoing motion and notice, together with statement of facts, argument and authorities received this third day of February, 1916.

GILBERT E. KEMP,

Attorney of Record for Plaintiff in Error.

STATEMENT OF FACTS

This is a writ of error from a judgment of the Supreme Judicial Court of Massachusetts rendered on a petition for instructions brought to determine whether Fannie Leighton Luke or John E. Eaton, her Trustee in Bankruptcy, is entitled to the interest in the trust fund and income vested in said Fannie Leighton Luke at the time of her being adjudicated bankrupt. (Rec. p. 3).

Said Fannie Leighton Luke is a beneficiary under the will of her father, who died in Massachusetts, October 6, 1897, and whose will was duly proved and allowed by the Probate Court for the County of Norfolk, November 3, 1897. The petitioner in the Supreme Judicial Court of Massachusetts, the Boston Safe Deposit & Trust Co., was named as trustee in the said will, and the sum of seventy-five thousand dollars ($75,000) in money was bequeathed to the said Trustee in trust, to invest and manage separate and apart from all other property held by it in trust. Out of this trust fund the testator made provision for his daughter, the said Fannie Leighton Luke, in Section 1 of Article II. of said will, as follows (Rec. p. 3):

> "The whole of the net income thereof to be paid my adopted daughter Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline, during her life, quarterly in each and every year, together with such portion of the principal of said trust fund as shall make the amount to be paid her at least $3,000 a year during her life, said income to be free from the interference or control of her creditors."

The Trustee under the said will has, since qualifying as such Trustee, paid to the said Fannie Leighton Luke the income of the trust fund as provided, up to and including the payment made October 10, 1913. The said income has always amounted to $3,000 or more,

per year, so that it has not been necessary for the Trustee to exercise its discretion in making payment out of the principal.

On October 31, 1913, certain creditors of said Fannie Leighton Luke filed an involuntary petition in bankruptcy against her, and on December 3, 1913, she was duly adjudicated a bankrupt, and on February 21, 1914, John E. Eaton, of Boston, was appointed Trustee in Bankruptcy of her estate. (Rec. p. 4).

The said Trustee in Bankruptcy, on behalf of the creditors, laid claim to the entire estate of the said Fannie Leighton Luke under Section 1 of Article II. of the said will, and if this claim be held invalid he then laid claim to certain items of income accrued or accruing as set forth in the record in the agreed statement of facts. (Rec. pp. 9 and 10).

The Trustee in Bankruptcy contended that the interest of the *cestui que trust* was assignable, and therefore passed to the said Trustee in Bankruptcy under Section 70A of the Bankrupt Act, but the Supreme Judicial Court of Massachusetts held that the whole income, including all arrearages, should be paid to the life tenant. The opinion of the Court is as follows (Rec. p. 13):

> "The Trustee in Bankruptcy seeks to take this case out of the decision of *Billings* v. *Marsh*, 153 Mass. 311 and *Munroe* v. *Dewey*, 176 Mass. 184, because here the bankrupt's equitable life interest was assignable. There is nothing in the will which forbids the life tenant's assigning her equitable life interest. It follows that it was assignable." *Ames* v. *Clark*, 106 Mass. 573. *Huntress* v. *Allen*, 195 Mass. 226.
>
> "It is the contention of the Trustee in Bankruptcy that being assignable, the life interest passed to him under paragraph 70-a (5) of the Bankrupt Act, which provides that all 'property which prior to the filing of the petition he (the

bankrupt) could by any means have transferred' shall vest in the Trustee.

"But the immunity of the equitable life interest in the case at bar does not depend upon the kind of property which (by the terms of the Bankrupt Act) passes to the Trustee in Bankruptcy. The immunity of the equitable life interest goes farther back. It goes back to the fact that this equitable life interest is not subject to bankruptcy proceedings at all. By the terms of the will creating it, the equitable life interest here in question is to be 'free from the interference or control of her (the life tenant's) creditors.' It is immaterial whether the machinery set in motion by the creditors is a bill in equity to reach and apply her equitable interests, or an involuntary petition in bankruptcy to secure all her property legal or equitable. The equitable life estate created by the will here in question is 'to be free from the interference or control of her creditors,' and under the doctrine of *Broadway National Bank* v. *Adams*, 133 Mass. 170, that direction will be enforced. We have examined all the cases cited by the Trustee in Bankruptcy and find nothing in them which requires notice.

"By the terms of the will 'the whole income' is to be 'free from the interference or control of her (the life tenant's) creditors.' The whole income, including all arrearages, is to be paid to the life tenant.

"No question has arisen requiring the Court to instruct the Trustee as to the use of the principal to make the income up to three thousand dollars.

"A decree must be entered directing the plaintiff to pay to the life tenant the whole income, including all arrearages; and it is so ordered."

From this judgment the said Trustee in Bankruptcy brought to this Court a Writ of Error on the ground that a right, privilege or title was claimed by the petitioner under Section 70A of the

Bankrupt Act and that the Supreme Judicial Court of Massachusetts, by its judgment had denied the right, privilege or title claimed by him, and by so doing had acted contrary to the legal effect, intent, meaning and purpose of the said Bankrupt Act. (Rec. p. 14).

ASSIGNMENT OF ERRORS

(Rec. p. 17).

1. The said Supreme Judicial Court of Massachusetts erred in making and rendering its judgment and directing a decree whereby the said Boston Safe Deposit and Trust Company was ordered to pay to the life tenant the whole of the life income, including arrearages.

2. The said Court erred in not making and rendering a judgment and directing a decree that the said Boston Safe Deposit and Trust Company should pay to the Trustee in Bankruptcy of the estate of the said Fannie Leighton Luke, all payment of income accruing under the provision of Section 1 Article II., of the will of John W. Leighton for the life of the said Fannie Leighton Luke.

3. The said Court erred in holding and ruling that the said Fannie Leighton Luke was entitled, notwithstanding her adjudication as bankrupt, to all income that had accrued to the date of her adjudication in bankruptcy, December 3, 1913.

4. The said Court erred in its judgment in not holding, ruling and directing that a decree be entered awarding to the said Trustee in Bankruptcy all income that had accrued under the provisions in Article II., including Section 1 thereof, in said will, up to the

date of her adjudication as bankrupt, December 3, 1913.

5. The said Court erred in its judgment in holding and ruling that the equitable life interest which, prior to her bankruptcy, was vested in the said Fannie Leighton Luke, was not subject to or affected by the bankruptcy proceedings at all.

6. The said Court erred in its judgment by not holding and ruling that the right or title to the equitable life interest in question, being an assignable interest, vested by operation of law in the petitioner as Trustee in bankruptcy of the estate of said Fannie Leighton Luke.

7. The said Court erred in its judgment or decree in not giving full legal effect to the provisions contained in Section 70A of the Bankrupt Act, the same being Chapter 541 of the United States Statutes of 1898.

ARGUMENT

INTRODUCTION

The argument of the plaintiff in error, the Trustee in Bankruptcy, is that the interest of the *cestui que trust* under Section 1 of Article II. of the will is assignable by her voluntary act, and from this he argues that it passes to the Trustee in Bankruptcy by operation of Section 70A of the Bankrupt Act.

The defendant in error, the said Fannie Leighton Luke, contends that her interest does not pass to the Trustee in Bankruptcy, because

I. The trust estate created by the will is by its very nature not subject to bankruptcy proceedings, whether assignable or not.

II. Section 70A expressly excludes from its operation all property exempt from creditors under the State law, regardless of its assignability.

III. The interest of the *cestui que trust* is not assignable by her voluntary act.

IV. The interest of the *cestui que trust* in the body of the Trust Fund, the cash in the hands of the trustee on October 10, 1913, and the interest accruing but not due at the time of the adjudication, should be treated the same as the income, and should not pass to the Trustee in Bankruptcy.

BODY OF ARGUMENT

I.

The trust estate created by the will is by its very nature not subject to bankruptcy proceedings.

It is settled law in Massachusetts that a donor may, in creating an equitable estate, carve out and create such equitable rights in property as his fancy may dictate without regard to the rights appertaining to the several estates known to the law. He may give a qualified interest, and the *cestui que trust* acquires no interest other than the strictly limited one created by the terms of the trust.

Dunn v. *Dobson*, 198 Mass. 142.
Hale v. *Bowler*, 215 Mass. 354.

As a result of the recognition of such a power in a donor, the doctrine of Spendthrift Trusts has developed in Massachusetts and in almost every other State. Under this doctrine it is competent for a settlor to create a trust estate for the life of the *cestui que trust*, with a proviso that the said interest of the *cestui que trust* shall be beyond the control of creditors.

The question of whether a Spendthrift Trust is created depends solely upon the testator's intent. If such an intent is shown, such a trust is at once created.

Broadway National Bank v. *Adams*, 133 Mass. 170.
Nickerson v. *Van Horn*, 181 Mass. 562.
Baker v. *Brown*, 146 Mass. 369, 371.
Sanger v. *Bourke*, 209 Mass. 481, 486.

No particular terms or technical language is necessary.

Baker v. *Brown*, 146 Mass. 369, 371.
Berry v. *Dunham*, 202 Mass. 133, 139.

It is settled law, that a Spendthrift Trust is created, provided the intention of the testator that there should be such a trust, can be shown. The question then arises whether there is such an intention shown in this will. It is clear that the language used by the testator is as broad as possible; "said income to be free from the interference or control of her creditors." This shows the intention of the testator as plainly as it could possibly be shown. He intended to create a limited equitable estate in his daughter that would insure to her at least $3,000 a year during her life, without the interference of her creditors. This was his intent and this is the estate he created.

Therefore, the estate in question in this case is a Spendthrift Trust. As such, it has all the incidents of this limited estate, for example:

(1) It cannot be appropriated by creditors.

Broadway National Bank v. *Adams*, 133 Mass. 170.

(2) It cannot be reached by an assignee in insolvency.

Billings v. *Marsh*, 153 Mass. 311.

(3) It does not pass to a Trustee in Bankruptcy.

Spindle v. *Shreeve*, 4 Fed. 136.
In re McKay, 143 Fed. 671.
Munroe v. *Dewey*, 176 Mass. 184.

But, despite these cases, the Trustee in Bankruptcy contends that creditors can reach it by a proceeding in bankruptcy; that a testator can create an equitable estate that will be free from interference or control by creditors, and yet that creditors can interfere with it through such a procedure as bankruptcy.

The National Bankrupt Act cannot subject to the claims of creditors of A the property of B. Neither can it subject to the claims of creditors of A such property belonging to A as is beyond the control of creditors. To say that the Bankrupt Act can and does allow creditors to reach a certain piece of property, is to say that that property is not of such a character as to be free from their control. One or the other must be true; either it is beyond the control of creditors, in which case it cannot be reached by the Trustee in Bankruptcy, or it can be reached by the Trustee in Bankruptcy, in which case it is not property that is free from the interference or control of creditors. If the latter of these two is true, then there can be no Spendthrift Trust that will be beyond the reach of creditors.

That this is not true is clear from the many decisions in the courts of Massachusetts and other States, and moreover from the decisions of this Honorable Court. The doctrine that an equitable estate can be created that will be free from the interference or control of creditors is set forth in the following cases:

Nichols v. *Eaton*, 91 U. S. 716.
Hyde v. *Woods*, 94 U. S. 523.
Potter v. *Couch*, 141 U. S. 296, 318.
Shelton v. *King*, 229 U. S. 90.

In the first of these cases Mr. Justice Miller made an elaborate defense of Spendthrift Trusts, setting forth in apt language and with great vigor the grounds upon which the doctrine rests. Then in *Hyde* v. *Woods*, 94 U. S. 523, he says that it is not against the policy of the bankrupt law or against public policy to permit a man to make in this manner a standing appropriation of his property to the prejudice of the general creditors of the donee. Both of these cases show clearly that such an estate does not pass to the Trustee in Bankruptcy, assignable or not assignable.

The whole idea was clearly and forcibly expressed in the opinion given by the Supreme Judicial Court of Massachusetts in the present case, to which the Trustee in Bankruptcy has brought this writ of error. The Court there says (Rec. p. 13):

> "The immunity of the equitable life interest in the case at bar does not depend upon the kind of property which (by the terms of the Bankrupt Act) passes to the Trustee in Bankruptcy. The immunity of the equitable life estate goes further back. It goes back to the fact that this equitable life interest is not subject to bankruptcy proceedings at all. By the terms of the will creating it, the equitable life interest here in question is to be 'free from the interference or control of her (the life tenant's) creditors." It is immaterial whether the machinery set in motion by the creditors is a bill in equity to reach and apply her equitable interests, or an involuntary petition in bankruptcy to secure all her property, legal or equitable. The equitable life estate created by the will here in question is 'to be free from the interference or control of her creditors,' and under the doctrine of *Broadway National Bank* v. *Adams*, 133 Mass. 170, that direction will be enforced."

In other words, here is an estate that is stamped with a certain character, *i. e.*, it is absolutely exempt

from claims of creditors. That is its nature, and it cannot be made to partake of a different nature. It is a non-subject to creditors' species of property, and must remain so.

The conclusion is unescapable that a testator can create an equitable interest that is absolutely beyond the reach of creditors; that it is a question of his intention whether there is such an estate; that such an intention is plainly evident in this case; that this equitable life estate is of a nature that is beyond the control of creditors, whether it is or is not assignable; and, consequently, that it does not and cannot be made to pass to the Trustee in Bankruptcy for the benefit of creditors.

II.

The equitable estate of the *cestui que trust* under the will can not pass to the Trustee in Bankruptcy because of the very nature of the estate, as already shown. But, in addition to this, and looking at the Bankrupt Act itself, it is clear that the act does not attempt to reach such property. In short, Section 70A of the Bankrupt Act expressly excludes from its operation all property exempt from creditors under the State law that governs, even though assignable.

This Section provides as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

There is an express provision here that this Section shall apply "except in so far as it is to property which is exempt." This is a specific limitation on the general words of the Section, and property which is exempt from the claim of creditors under the State law does not pass to the Trustee in Bankruptcy, regardless of its assignability. By statutes in every State a debtor is entitled to a certain amount of property, exempt from the claims of creditors. To such property a creditor has no right to look for payment of his debt, as he knows when he parts with his consideration that such property can never be made liable to his debts. Mr. Justice Miller, in *Nicholls* v. *Eaton*, 91 U. S. 716, at p. 726, points out the analogy of this principle to Spendthrift Trusts. They are exempt from claims of creditors by judicial decision, rather than by statute. But there is no essential difference, except in the means of creation. The result is the same in either case, and the ordinary rights of creditors are withdrawn from part of the debtor's property.

It is clear that Section 70A provides that the trustee of the bankrupt shall be vested with the title of the bankrupt, except in so far as it is to property over which his creditors have no control. What part of his property is withdrawn from the reach of creditors is a question of the law of the State having jurisdiction —in this case Massachusetts.

In re McKay, 143 Fed. 671.
Nichol v. *Levy*, 5 Wall. 433.
Spindle v. *Shreve*, 111 U. S. 542.

It is entirely immaterial how the exemption is created; whether by statute or by judicial decision. Once it is determined that the creditor's rights are withdrawn from certain property, then that property is expressly excepted from Section 70A and does not

pass to the Trustee in Bankruptcy, whether assignable or not.

Moreover, Section 6 of the Act provides as follows:

> "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition."

Mass. Revised Laws, Chapter 177, Section 34, enumerates certain kinds of property which are exempt from seizure on execution. Besides these, Revised Laws, Chapter 167, Section 38, provides that "all real and personal property which is liable to be taken on execution, except such personal property as from its nature or situation, has been considered as exempt, according to the principles of the common law as adopted and practiced in this Commonwealth may be attached upon the original writ," etc.

Here we have an express statutory recognition of personal property which from its nature has been considered as exempt according to the principles of the common law. The statute provides that such property cannot be attached by a creditor. The Bankrupt Act in Section 6 says that the exemptions prescribed by the State laws shall not be affected. Therefore, Section 6 in effect provides that the Bankrupt Act shall not transfer to the Trustee in Bankruptcy property enumerated in Section 34 of Chapter 177 and in Section 38 of Chapter 167 of the Massachusetts Revised Laws.

It cannot be disputed that a Spendthrift Trust is within Massachusetts Revised Laws, Chapter 167, Section 38. It is that kind of a debtor's personal estate which from its nature has been considered as exempt, according to the principles of the common law as adopted and practiced in Massachusetts. The framers of Chapter 167 must have had just such an

interest in mind when they framed this Section, and must have intended to give this exemption an express statutory authority, placing it on a par with the property enumerated in Chapter 177, Section 34, as exempt from levy on execution. Therefore, it is within Section 6 and is not affected by the Bankrupt Act.

The conclusion that this property is exempt from the Act by Section 6 and by Section 70A is fortified by consideration of the fact that bankruptcy is in its nature simply an equitable process to subject to the claims of creditors the property of the bankrupt and divide it ratably among them. The Federal Act introduces no new class of creditors, nor does it give to creditors any greater rights against the property of the debtor than they have under the State law, except in cases of preferences and fraudulent conveyances.

Hanover National Bank v. *Moyses*,
186 U. S. 181.

This case expressly decides that the Bankrupt Act is uniform and, therefore, constitutional when the Trustee in Bankruptcy in each State takes whatever would have been available for creditors if the bankrupt law had not been passed. At page 189 the Court says:

> "It was made a rule of the bankrupt law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy and applying it to the payment of all his debts. It is quite proper, therefore, to confine its operation to such property as other legal process could reach."

In the case of *In Re Cohn* 171 Federal Report 568, 571, the Court says:

> "The cardinal principle of the Bankruptcy Act is to grant to creditors only those rights which would have been theirs if bankruptcy had not supervened, and to save to the bankrupt and his family every right and exemption which would have been theirs, as against creditors enforcing their claims by ordinary judicial process."

The same principle is laid down in *Holden* v. *Stratton* 198 U. S. 202 and in *Norcross* v. *Nathan*, 99 Federal Report 414, 421.

Therefore, the defendant in error contends that Section 70A expressly excludes from its enumeration of classes of property that pass to the Trustee in Bankruptcy, such property as is withdrawn from the reach of creditors by the law of the State having jurisdiction; that by the law of Massachusetts the estate of the *cestui que trust* under the will is beyond the reach of creditors, that it is, therefore, excepted from this Section and does not pass to the Trustee in Bankruptcy, regardless of its assignability.

III.

Thus far the defendant in error has disregarded the question as to whether this estate is assignable by her voluntary act. This question is entirely immaterial, as was pointed out by the Massachusetts court in its decision of this case, since the property does not pass to the Trustee in Bankruptcy, whether it is or is not assignable (Rec. p. 13). If, however, this question should be considered material by this Court, the defendant in error contends that her interest is not assignable by her voluntary act, and therefore does not pass to the Trustee in Bankruptcy under Section 70A even as an assignable interest.

There has been no express decision on this point in Massachusetts. The dictum of Justice Loring (Rec. p. 13) that the interest of the beneficiary was assignable, was unnecessary to the decision of the case, according to the view taken by the Massachusetts court, nor is it supported by the two cases cited. *Ames* v. *Clark*, 106 Massachusetts 573, was decided before the court in *Broadway National Bank* v. *Adams*, 133 Massachusetts 170, had decided that a vested interest in a trust for life could be made non-assignable and beyond the reach of creditors, in other words, before the creation of Spendthrift Trusts. The other case, *Huntress* v. *Allen*, 195 Massachusetts 226, related to the question of a restraint at the time of the final distribution, there being an attempt to tie up the remainder over at the end of the life estate.

While there has been no express decision on this point in Massachusetts, Courts of other States which have developed the doctrine of Spendthrift Trusts along the same lines as Massachusetts has, hold that such an estate is not assignable, even though that is not expressly stipulated, as that would prevent the object of the testator from being carried out.

Bennett v. *Bennett*, 217 Illinois 434.
Mehaffey's Estate, 139 Pa. St. 276.

If this question is considered material by this Court, and if the exemption of this estate from passing to the Trustee in Bankruptcy, is held to depend upon the narrow question of its assignability, as contended by the plaintiff in error, it is for this Court to decide whether it is or is not assignable. That it is not seems clear from the many decisions holding that all that is necessary in order to create a Spendthrift Trust is for the settlor to show such an intention, and from the fact that only by holding it to be non-assignable can the

testator's real intention be fully carried out and the annual income of three thousand dollars ($3,000) be assured to his daughter for the rest of her life.

The will provides as follows (Rec. p. 3):

> "The whole of the net income thereof to be paid my adopted daughter Fannie Leighton Luke, wife of Otis H. Luke, during her life, quarterly in each and every year, together with such portion of the principal of said trust fund as shall make the amount to be paid her at least three thousand dollars ($3,000) a year during her life, said income to be free from the interference or control of her creditors."

Here the testator in safeguarding the object of his bounty expressly provided that regardless of whatever might happen, she should receive during each and every year at least three thousand dollars. The enjoyment of this income by the beneficiary, without deduction from any cause whatever, may be said to be the paramount object of the testator, to which all other objects are made subordinate. To give the beneficiary power to assign her interest would necessitate the implication of the power on her part to defeat the purpose clearly expressed in the will. This should not be done.

> "It seems to us equally plain that the power of alienation by anticipation is inconsistent with and would tend directly to defeat this main object and purpose of the will. The power is not given in terms. A power may be implied to effect the purposes of the testator, but not to defeat them."
>
> *Perkins* v. *Hays*, 3 Gray 405, 410.

The Court should carry out the testator's intention that the interest of the beneficiary be beyond the inter-

ference or control of creditors. It is to be observed that nothing was said in the will about this interest being assignable, but simply that it be beyond the control of creditors. Even if the testator had provided that the interest of the *cestui que trust* was to be assignable by her voluntary act, as well as being beyond the control of creditors, then if these are inconsistent and if it must be non-assignable in order to be beyond the reach of creditors, the Court would have to pick out one of these objects and sacrifice the other.

Malcom v. *Malcom*, 3 Cushing 472.

So even if the testator had expressly stated that the equitable estate was assignable, if the Court found that giving force to this would prevent carrying out the paramount object, *i. e.*, that it be beyond the control of creditors, then the Court should choose between the two, and hold it non-assignable.

If this is so, in a case where there is an express declaration of the testator's intention, that it be voluntarily assignable, so much the more must it be non-assignable in a case where there is nothing said about its being assignable.

Wherefore the defendant in error contends that the paramount object of the testator that the interest of the *cestui que* trust be beyond the control of creditors should be carried out; that the intent to create a Spendthrift Trust is clear and that the incident of non-assignability attaches to such an estate without express mention; and that, besides being exempt from the operation of the Bankrupt Act by the very nature of the property, and by the express words of the Act, regardless of the question of assignability, the property does not pass to the Trustee in Bankruptcy under Section 70A, because it is not assignable.

IV.

The possible interest of the defendant in error in the body of the Trust Fund is not affected by the bankruptcy proceedings. It is reasonable to assume that by "said income" the testator meant the assured income of at least three thousand dollars ($3,000) a year, from whatever source, and provided that it should be free from interference by creditors. The interest of the *cestui que trust* in the body of the Trust Fund is merely contingent on the income amounting to less than three thousand dollars ($3,000) a year; the amount, if any, to be paid her out of the principal, provided the income amounts to $3,000 a year, being discretionary on the part of the trustee.

As to the cash in the hands of the trustee under the will at the time of making the last payment of income, October 10, 1913, that cannot be taken by the Trustee in Bankruptcy. The *cestui que trust* herself had no power over it until it should come into her possession. It had not yet become her property for the purpose of disposition, and neither her creditors nor her Trustee in Bankruptcy could have any greater rights in it than she herself had acquired.

Hale v. *Bowler*, 215 Mass. 354, 357.
Bennett v. *Aetna Insurance Co.*, 201 Mass. 554.

As to the interest accruing, but not due or payable at the time of the adjudication, December 3, 1913, that cannot be taken by the Trustee in Bankruptcy, it being directly contrary to the provisions of the will. The decree of the Massachusetts Supreme Judicial Court was clearly correct in ruling that as to none of these items did title pass to the Trustee in Bankruptcy. (Rec. p. 14).

SUMMARY OF ARGUMENT

Wherefore the defendant in error contends that her interest does not pass to the Trustee in Bankruptcy, because

I. The trust estate created by the will is by its very nature not subject to bankruptcy proceedings, whether assignable or not.

II. Section 70A expressly excludes from its operation all property exempt from creditors under the State law, regardless of its assignability.

III. The interest of the *cestui que trust* is not assignable by her voluntary act.

IV. The interest of the *cestui que trust* in the body of the Trust Funds, the cash in the hands of the Trustee on October 10, 1913, and the interest accruing but not due at the time of the adjudication, should be treated the same as the income, and held not to pass to the Trustee in Bankruptcy.

CONCLUSION

Therefore, as provided in Sections 4, 5 and 6 of Rule 6 of the Rules of the Supreme Court of the United States, the defendant in error, Fannie Leighton Luke makes the following motions:

I. That the writ of error in this case be dismissed for want of jurisdiction, in that it is entirely a question of State law whether or not the interest of the *cestui que trust* is subject to the claim of creditors in any way. (*Nichol* v. *Levy*, 5 Wall 433; *Spindle* v. *Shreve*, 111 U. S. 542.)

New Orleans Water Works Co. v. *La.*, 185 U.S. 336, 345, and authorities there cited.

Equitable Life Assurance Society v. *Brown*, 187 U. S. 308.

II. That the judgment of the Supreme Judicial Court of Massachusetts be affirmed on the ground that it is manifest that the writ was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

Chanute City v. *Trader*, 132 U. S. 210..
Richardson v. *Louisville R. R.*, 169 U. S. 128.
Blythe v. *Hinckley*, 180 U. S. 333, 338.
Equitable Life Assurance Society v. *Brown*, 187 U. S. 308.

III. That this case be transferred to the summary docket, if the Court should decline to dismiss the writ of error or affirm the judgment of the Supreme Judicial Court of Massachusetts, on the ground that it does not justify extended argument.

RAYMOND H. OVESON,
ALEXANDER KENDALL,
MATTHEW HALE,
Of Counsel.